Supreme Court, U.S.
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No. 87-386

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

BRIAN LISTER
Petitioner,
VS.
NORTH AMERICAN ROCKWELL, AUTONETICS,
Respondent.

On Petition For A Writ Of Certiorari To the United States Court of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Was the Ninth Circuit Court of Appeals correct in affirming the District Court's determination that Respondent Rockwell did not discriminate against Petitioner Lister in violation of Title VII by implementing its Skills Development Program, voluntarily designed and adopted to correct minority imbalances in the work force?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, North American Rockwell, Autonetics, respectfully submits this brief in opposition to the Petition for Writ of Certiorari:

STATEMENT OF THE CASE

On or about November 12, 1976, Petitioner Brian Lister (referred to herein as "Petitioner" or "Lister") instituted the present action against his former employer, North American Rockwell, Autonetics (subsequently called Rockwell International Corporation and referred to hereinafter as "Respondent" or "Rockwell"). In his Complaint, Lister alleges that Rockwell discriminated

against him because of his race, Caucasian, and his national origin, Anglo, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

On February 5, 1982, Rockwell filed a Motion for Summary Judgment on the ground that Lister's "reverse discrimination" action was indistinguishable from *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), where this Court held that Title VII does not forbid a private employer from implementing a voluntary affirmative action plan that accords racial preferences in order to rectify an imbalance in minority representation in its work force.

On February 21, 1984, Judge Stephens denied Rockwell's motion on the ground that "material issues of fact exist with respect to whether Rockwell's SDP (Skills Development Program) program conforms to the requirements of *United Steelworkers of America v. Weber, supra.*" On May 7, 1984, Rockwell moved the District Court to reconsider.

On June 22, 1984, Judge Byrnes, to whom this case had been transferred on March 19, 1984, granted Rockwell's Motion to Reconsider and entered judgment for Rockwell and against Lister. Judgment was entered on June 25, 1984.

On or about July 24, 1984, Lister filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the Order granting Rockwell's Motion for Summary Judgment. On January 8, 1986, the Ninth Circuit Court of Appeals affirmed the District Court's determination. On or about April 12, 1986, Lister filed a Request for Rehearing with the Ninth Circuit Court of Appeals. On May 19, 1986, the Ninth Circuit Court of Appeals denied the Petition for Rehearing.

On or about August 9, 1986, Lister attempted to file a Petition for a Writ of Certiorari with this Court. Apparently, this Petition was rejected for failure to comply with the Rules of the Court. On or about June 18, 1987, Lister attempted to file a second Petition, which again was rejected by this Court for failure to comply with its Rules. Lister was given 21 days to resubmit it in the proper form for filing. See Appendix A to Opposition. Thereafter, on or about September 4, 1987, Lister filed the instant Petition with this Court, and on September 18, 1987, notified Respondent by registered mail that the Petition had been docketed.

BASIS FOR JURISDICTION

Although Lister failed to so state in his Petition, presumably the jurisdictional basis for the Petition is 28 U.S.C. § 1254(1).

In 28 U.S.C. § 2101(c), however, Congress provided that a Writ of Certiorari to the Supreme Court from a judgment in a civil action shall be "applied for within ninety days after the entry of such judgment" and that this time may be extended by a Justice, for good cause shown, "for a period not exceeding sixty days." Because these time limitations are prescribed by Congress, the untimely filing of a Petition For a Writ of Certiorari is considered to be a jurisdictional defect, and this Court uniformly has denied such petitions for want of jurisdiction. *Department of Banking v. Pink,* 317 U.S. 264, 268 (1942). See also *Matton Steamboat Co. v. Murphy,* 319 U.S. 412 (1943); *Citizens Bank v. Opperman,* 246 U.S. 448, 450 (1919). This jurisdictional requirement of timeliness is strictly applied in civil cases. No exceptions or waivers are recognized; no matter how extenuating the circumstances, an untimely petition will not be entertained. See,

e.g., *Deal v. Cincinnati Board of Education,* 402 U.S. 962 (1971) (airline lost all the papers); *Teague v. Commissioner of Customs,* 394 U.S. 977 (1969) (unforeseeable snow storm created a postal delay).

Here, Petitioner attempted to file his original Petition within the 90 day period provided by 28 U.S.C. § 2101(c), but the Petition was rejected by the Court for failure to comply with its Rules. He then made no further filing within the remainder of the 90 day filing period. Instead, Petitioner waited over ten months, from about August 9, 1986 to about June 18, 1987, before attempting to file a second Petition, which was also rejected by the Court. Although he was notified by the Court Clerk that he must resubmit the Petition in proper form within 21 days (see Appendix A to Opposition), he waited more than two months, from about June 18, 1987 to about September 4, 1987, before filing the Petition now before the Court.

Rockwell has received no notice from the Court or Lister that he was granted any extension of time to file his Petition. He certainly did not seek one in compliance with Supreme Court Rule 29. Assuming, *arguendo,* that he was granted such an extension, it could not in any event have exceeded sixty days pursuant to 28 U.S.C. § 2101(c).

Furthermore, United States Supreme Court Rule 33.7 states in pertinent part that:

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its

> discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel."

Assuming *arguendo* that the Court does not deem Lister's original Petition untimely, the Court should dismiss the instant Petition because Lister did not substitute new and proper copies promptly pursuant to Rule 33. To the contrary, he waited over ten months before attempting to substitute a second Petition. Moreover, when that Petition was also rejected, he ignored the Clerk's instruction to substitute new and proper copies within 21 days (Appendix A to Opposition). Therefore, this Petition is untimely and this Court has no jurisdiction.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition is Untimely and Therefore This Court Lacks Jurisdiction.

This issue is addressed *supra* under the heading "Basis for Jurisdiction."

2. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition.

The Petition states that the question presented is, "were Petitioner Lister's rights, under the Equal Protection Clause of the Fourteenth Amendment, violated by North American Rockwell when they laid off Lister. . . ." But neither the District Court nor the Ninth Circuit Court of Appeals decided that question in this proceeding. Petitioner's original Complaint alleged only a violation of Title VII of the Civil Rights Act of 1964, not a violation of the Fourteenth Amendment's Equal Protection Clause. The District Court's judgment therefore was

limited to a Title VII action. See Appendix to Petition at pages 16-20. Similarly, the question presented to the Ninth Circuit Court of Appeals, from which Lister's Petition for a Writ of Certiorari is taken, was whether Rockwell's voluntary affirmative action plan violated Title VII, not the Fourteenth Amendment's Equal Protection Clause. That Court ruled only on the Title VII question. See Appendix to Petition at pages 9-11.

This Court generally limits its consideration of the case "to the questions specifically brought forward by petition." *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 177-178 (1938). Those questions must, in addition, properly arise in the record, *Tyrrel v. District of Columbia,* 243 U.S. 1 (1917), and must have been argued and briefed below, *California v. Taylor,* 353 U.S. 553, 557, n.2 (1957). See also *United States v. Ortiz,* 422 U.S. 891, 898 (1975). The Court has also declared that it "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adicks v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970). Moreover, in *Johnson v. Transp. Agency, Santa Clara Cty., Cal.,* ____ U.S. ____, 107 S. Ct. 1442, 1446, n.2 (1987), the Court refused to decide whether a voluntary affirmative action plan violated the Equal Protection Clause as well as Title VII because "no constitutional issue was either raised or addressed in the litigation below." Because the Petition raises only the Fourteenth Amendment Equal Protection Clause question and does so for the first time in this proceeding, it should be denied.[1]

---

[1]Even if the Court considers the Fourteenth Amendment Equal Protection Clause issue, the Petition should be denied because Rockwell is a private, not a public, employer and therefore is not covered by the Fourteenth Amendment. *Rendell-Baker v. Kohn,* 457 U.S. 830, 837 (1982). See also *Johnson v. Transp. Agency Santa Clara*

3. There Are No Special and Important Reasons For The Court to Grant This Petition For Review On Writ of Certiorari.

Supreme Court Rule 17 states in pertinent part that "a review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Lister's Petition presents no such reasons and therefore should be denied.

The Ninth Circuit Court of Appeals in this proceeding affirmed the District Court's judgment that Rockwell complied with this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), when it laid off Lister pursuant to a voluntary affirmative action plan and therefore did not violate Title VII. *Weber* was recently affirmed by this Court in *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, ____ U.S. ____, 107 S. Ct. 1442 (1987). Therefore, Lister's Petition neither raises an important question of federal law which has not been, but should be, settled by this Court, nor one that was decided in conflict with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

The only argument made by Lister in support of the Petition is that the decision below is contrary to three cited cases. Even ignoring for the moment the fact that *Weber* and *Johnson* are controlling, all of those cases are inapposite. One of them, *Chance v. Board of Examiners*, 534 F.2d 993 (2nd Cir. 1976), *cert. denied*, 431 U.S. 965 (1977), *rehearing denied*, 434 U.S. 881 (1977), deals with

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Cty., Cal., ____ U.S. ____, 107 S. Ct. 1442, 1446, n.2 (1987) ("of course, where the issue is properly raised, *public employers* must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. (Emphasis added; citations omitted).

a wholly different question — whether a *bona fide* seniority system that operates on a "last hired-first fired" basis is invalid if it disproportionately affects minorities.

The second case cited by Lister, *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984), is inapposite for virtually the same reason as *Chance,* as the Ninth Circuit Court of Appeals noted below:

> "Lister also argued that *Firefighters Local Union No. 1784 v. Stotts,* 104 S. Ct. 2576 (1984) supports his position since the Supreme Court invalidated an injunction which prohibited a municipality from instituting a last hired, first fired policy. *Firefighters* is not dispositive. The Supreme Court 'simply [held] that a court may not modify a pre-existing race-conscious consent decree in such fashion that employment practices would divest another group of employees of entitlements under a bona fide seniority system.' *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985)." (See Appendix B to Opposition)

Similarly, *Local 93, Firefighters v. City of Cleveland,* ____ U.S. ____, 106 S. Ct. 3063 (1986), dealt not with a voluntary affirmative action plan but presented the question whether Title VII precludes the entry of a consent decree which provides relief that may benefit individuals who were not the actual victims of the defendant's discriminatory practices. That this Court answered "no" supports the action taken by the courts below in this case to the extent *Local 93* is relevant at all.

The District Court below found that Lister was laid off pursuant to a voluntary affirmative action plan that satisfied all of *Weber*'s requirements. See Appendix to Petition at pages 16-20. The Ninth Circuit Court of Appeals

affirmed. See Appendix to Petition at pages 9-11 and Appendix B to Opposition. Lister raises no special or important reason to grant his Petition. He merely states that the courts below erred in reaching their decisions, citing inapposite cases but failing to cite this Court's recent decision in *Johnson* reaffirming *Weber* and, therefore, the decisions of the courts below. Lister's Petition should therefore be denied.

CONCLUSION

For these reasons, the Petition For a Writ of Certiorari should be denied.

DAVID J. SHAPIRO
Counsel for Respondent

MARC G. KARTMAN
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2230 East Imperial Highway
El Segundo, California 90245

Appendix A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

July 2, 1987

Mr. Brian Lister
1414 North Lowel
Santa Ana, California 92706

Re: *Brian Lister v. North American Rockwell Autonetics*

Dear Mr. Lister:

Your petition for writ of certiorari was received June 18, 1987 but must be returned because it isn't in the proper form. First, the petition must meet the size requirements of Supreme Court Rule 33. Specifically, the size of the booklet must be 6⅛ by 9¼ inches. Second, the petition must be followed by an appendix containing the documents required by Rule 21.1(k). Third, the questions presented for review must be the very first item appearing in the petition. See Rule 21.1.

You may correct your petition accordingly and resubmit it for filing within 21 days of receipt of this letter. We have retained your $200 check in anticipation of your corrected filing.

Sincerely,

RUTH BUTLER
Assistant Clerk

cc: Mark Cartman, Esq.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN LISTER,
Plaintiff-Appellant,

v.

NORTH AMERICAN ROCKWELL AUTONETICS,
Defendant-Appellee.

CA NO, 84-6175
DC No. CV 76-3538
(Central California)

ORDER

Before: BARNES, FARRIS, and CANBY, Circuit Judges.

The panel has voted to amend the memorandum disposition filed January 28, 1986 by inserting a paragraph on page 3, line 6, just prior to the final paragraph of the disposition.

> Lister also argued that *Firefighters Local Union No. 1784 v. Stotts,* 104 S. Ct. 2576 (1948) supports his position since the Supreme Court invalidated an injunction which prohibited a municipality from instituting a last hired, first fired policy. *Firefighters* is not dispositive. The Supeme Court "simply [held] that a court may not modify a pre-existing race-conscious consent decree in such a fashion that

employment practices would divest another group of employees of entitlements under a bona fide seniority system." *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985).

The petition for rehearing is denied. The memorandum disposition filed January 28, 1986 is amended as set forth above.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 2, 1987, I served the within BRIEF IN OPPOSITION in re: "Brian Lister vs North American Rockwell Autonetics" in the United States Supreme Court October Term 1987 No. 87-386.

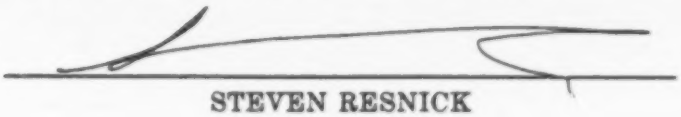
on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Brian Lister
1414 North Lowell
Santa Ana, CA 92706

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 2, 1987, at Los Angeles, California



STEVEN RESNICK